

S IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court No. 71101
District Court Case No. A698764

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BOMBARDIER TRANSPORTATION,
(HOLDINGS) USA, INC.,

Appellant,

vs.

NEVADA LABOR COMMISSIONER;
THE INTERNATIONAL UNION OF,
ELEVATOR CONSTRUCTORS; AND
CLARK COUNTY,

Respondents.

RESPONDENT CLARK COUNTY'S ANSWERING BRIEF

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TABLE OF CONTENTS

I. JURISDICTIONAL STATEMENT	1
II. STATEMENT OF THE ISSUES	1
III. ROUTING STATEMENT.....	1
IV. STATEMENT OF THE CASE	1
V. STATEMENT OF THE FACTS	1
VI. SUMMARY OF THE ARGUMENT	1
VII. STANDARD OF REVIEW.....	2
VIII. ARGUMENT	2
IX. CONCLUSION	8
CERTIFICATE OF COMPLIANCE	9
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

Cases

Day v. Washoe County Sch. Dist., 121 Nev. 387, 116 P.3d 68 (2005)3

Statutes

NRS 338.011 2, 3, 4, 7

I. JURISDICTIONAL STATEMENT

Respondent Clark County agrees with and adopts the Jurisdictional Statement contained in Appellant Bombardier Transportation's Opening Brief.

II. STATEMENT OF THE ISSUES

Respondent Clark County agrees with and adopts the Statement of the Issues contained in Appellant Bombardier Transportation's Opening Brief.

III. ROUTING STATEMENT

Respondent Clark County agrees with and adopts the Routing Statement contained in Appellant Bombardier Transportation's Opening Brief.

IV. STATEMENT OF THE CASE

Respondent Clark County agrees with and adopts the Statement of the Case contained in Appellant Bombardier Transportation's Opening Brief.

V. STATEMENT OF THE FACTS

Respondent Clark County agrees with and adopts the Statement of the Facts contained in Appellant Bombardier Transportation's Opening Brief.

VI. SUMMARY OF THE ARGUMENT

Respondent Clark County agrees with and adopts the Summary of the Argument contained in Appellant Bombardier Transportation's Opening Brief.

VII. STANDARD OF REVIEW

Respondent Clark County agrees with and adopts the Standard of Review contained in Appellant Bombardier Transportation's Opening Brief.

VIII. ARGUMENT

Respondent Clark County, by and through its counsel of record, Mark J. Ricciardi, Esq., hereby responds to and joins Appellant Bombardier Transportation's Opening Brief ("AOB"), filed on December 1, 2017.

As Bombardier asserts in its Opening Brief, the type of contract at issue, CBE-552, has never been considered a public works project that requires the payment of prevailing wages under NRS Chapter 338. *See* AOB 1-2. Instead, CBE-552 is a contract providing for the maintenance of the automated train system ("ATS") at McCarran International Airport ("Airport"). *See id.* CBE-552 is similar to the County's other maintenance contracts, such as those for the maintenance of its buses and elevator systems, which also are not considered public works projects requiring the payment of prevailing wages under NRS Chapter 338. *See id.*

Moreover, a contract awarded in compliance with NRS Chapter 332, which is directly related to the normal operation of the public body or the normal maintenance of its property, is not subject to the requirements of NRS Chapter 338. NRS 338.011(1). CBE-552 was awarded in compliance with NRS

Chapter 332, and as Bombardier establishes in its Opening Brief, directly related to the normal operation and maintenance of the County's Airport. *See* AOB 12, 33-48. Thus, the prevailing wage and specialized bidding requirements of NRS Chapter 338 do not apply to CBE-552.

This Court has stated that it will reverse an administrative decision "that is clearly erroneous in light of reliable, probative, and substantial evidence on the whole record." *Day v. Washoe County Sch. Dist.*, 121 Nev. 387, 387, 116 P.3d 68, 69 (2005) (internal quotations omitted). Substantial evidence is "that which a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotations and citations omitted).

Here, both the Labor Commissioner and the district court ignored substantial evidence that Clark County has consistently handled all of its major maintenance contracts the same way – as exempt from the prevailing wage requirements. For over thirty years, Clark County has applied a common sense, reasonable interpretation of the plain language of NRS 338.011(1) to distinguish between ATS maintenance contracts and construction contracts. *See* Appellant Bombardier Transportation's Appendix ("ER") 0421, 1322 (briefing this issue before the Labor Commissioner). As Bombardier emphasizes, the purpose of NRS 338.011(1) was to prevent the overbroad and unreasonable interpretation of prevailing wage laws, which previously frustrated the local government's right

to opt-out of competitive bidding requirements when it best served the public interest. *See* AOB 46-47. In enacting NRS 338.011(1), the Legislature intended to provide a safe harbor to protect public entities from a multitude of obligations placed upon public works projects, as well as help them manage costs by avoiding the harmful impact of a 1944 Opinion of the Attorney General. *See* AOB 47-48; Respondent Clark County's Appendix ("RCCA") 0021-0022 (briefing this issue before the district court).

Whenever Clark County has previously contracted for the on-site construction or major rehabilitation of any part of its ATS, the County has required that prevailing wages apply to workers at the Airport site. *See* ER 0420-0422 (briefing this issue before the Labor Commissioner); RCCA 0013-0015 (briefing this issue before the district court); ER 0426-0469 (relevant portions of prior contracts to which Clark County has applied the prevailing wage requirements of NRS Chapter 338).

Likewise, whenever Clark County has contracted for the maintenance of the ATS, the County has regarded the procurement of the services, supplies, materials, and equipment necessary to the normal operation and normal maintenance of the ATS as a contract properly awarded pursuant to NRS Chapter 332. *See* ER 0423-0424, 1325-1326 (briefing this issue before the Labor Commissioner); RCCA 0013-0015 (briefing this issue before the district court);

ER 0470-0549 (relevant portions of the “Shuttle Bus Operations and Maintenance for the Consolidated Car Rental Facility at McCarran International Airport” contract, which is analogous to CBE-552).

Further, the Labor Commissioner and the district court disregarded substantial evidence of the absolute necessity of the ATS system in relation to the normal operation and maintenance of the Airport. *See* AOB 35-41. Ample testimony, including testimony from Randall H. Walker (former Director of the Clark County Department of Aviation), was presented that the ATS system is essential to the Airport’s normal operation and that the Airport simply cannot function without the ATS. *See* AOB 10-12, 20, 29-41; ER 1326-1329 (briefing this issue before the Labor Commissioner); RCCA 0013-0017 (briefing this issue before the district court).

The Labor Commissioner’s clearly erroneous decision directly undermines Clark County’s common sense and reasonable interpretation of NRS 338.011(1), which the County has consistently applied to its prior contracts for over thirty years. Not only is this decision legally improper, but it also has extensive repercussions on how the Clark County Department of Aviation will function within the state. Clark County is the largest local government entity in Nevada, and unlike other Departments within the Clark County government, the Department of Aviation operates without the County’s general fund tax revenue.

As such, the Department of Aviation must strive to achieve a delicate balance in its operations – between acting as a good steward of the assets it is entrusted to manage and staying competitive as a self-sufficient enterprise.

With the threat of the application of the prevailing wage and specialized bidding requirements of NRS Chapter 338, vendors must weigh the benefits of conducting business with Clark County with the risks of pending litigation. Thus, the Labor Commissioner’s decision creates tension for the Department of Aviation’s fiscal operations, which results in arduous consequences for the County. As a matter of public policy, it must be noted that the Department of Aviation is obligated, pursuant to its Federal Aviation Administration grant assurances, to be economically self-sustaining. Given such economic pressures and constraints, if CBE-552 and other maintenance contracts are expanded to be considered “public works” projects subject to prevailing wages under NRS Chapter 338, as incorrectly determined by the Labor Commissioner and the district court, then the costs of maintenance work at the Airport will significantly increase. Such increased costs would, in turn, force the Department of Aviation into situations where the Department will not bid maintenance contracts as often or at all. The Department of Aviation may simply elect to have its employees perform such maintenance, which would result in increased internal labor obligations, fewer bidding opportunities for contractors, and the possibility of

inferior maintenance compared to what specialized maintenance contractors could perform. Additionally, the Department of Aviation may be forced to delay or completely forego performing certain maintenance. Under those realistic scenarios, the Airport would suffer from deteriorating facilities, which would impact Airport operations as well the traveling public's experience at the Airport.

Indeed, other contractors and labor unions are already using the clearly erroneous decisions from the Labor Commissioner and the district court in the subject case, in an attempt to apply an overly broad definition of "public works" to basic maintenance contracts. If this improper precedent from the Labor Commissioner and the district court is not overturned, labor unions and contractors will continue to try to apply prevailing wages to more and more maintenance contracts, which is contrary to NRS Chapter 332 and the explicit exception created by NRS 338.011(1).

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IX. CONCLUSION

Based on the foregoing, Clark County supports Bombardier in this appeal and concurs with the legal arguments, points, and authorities as presented in the Opening Brief. Thus, Clark County respectfully requests that this Court reverse and remand this matter because the district court erred in dismissing Bombardier's Petition for Judicial Review of the Labor Commissioner's decision.

Dated this 15th day of February, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that Respondent Clark County's Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

I further certify that Respondent Clark County's Answering Brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

Finally, I hereby certify that I have read Respondent Clark County's Answering Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that Respondent Clark County's Answering Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 15th day of February, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed electronically with the Nevada Supreme Court on the 15th day of February, 2018, Electronic service of the foregoing **RESPONDENT CLARK COUNTY'S ANSWERING BRIEF** shall be made in accordance with the Master Service List as follows:

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